Supreme Court of the United States

OCTOBER TERM, 1941

No. _____

NEBO OIL COMPANY, a Trust, by W. H. Clement, Trustee,
Petitioner,

vs.

GUY T. HELVERING, Commissioner of Internal Revenue,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Opinion of the Court Below

The opinion of the United States Circuit Court of Appeals for the Tenth Circuit is reported in 126 Fed. (2d) 148.

Jurisdiction

1. The date of the decision to be reviewed is February 18, 1942, rehearing denied March 24, 1942.

2. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by Act of February 13, 1925, 43 Stat. 938; Sec. 347 of Title 28, *U.S.C.A.*

Statement of the Case

The various proceedings and decisions have been given under the brief statement in the Petition for the Writ, to which this Brief is attached, and will not be here repeated. The statement of the facts is found R-25, et seq. The finding of facts by the Board is found R-14, et seq. The finding of facts as revised by the Circuit Court is found R-72, et seq. The admitted facts may be briefly summarized as follows:

In 1928 there existed partnerships composed of Replogle and Johnston, Replogle and Clement, Clement and Johnston, and Replogle, Clement and Johnston, all these parties maintaining joint offices (R-44). In that year these individuals acquired an oil and gas lease in the Oklahoma City field known as the Nebo-Little lease, each contributing an equal share to the cost. Title was vested in W. H. Clement, who, by operation of law, held the share of D. Replogle and William G. Johnston in trust. When acquired, the lease was in undeveloped territory, but gradual extension of the development produced offset wells by the year 1932. After acquisition Clement and his associates, without avail, attempted to dispose of the lease. In 1932 the lessors demanded development and threatened cancellation of the lease if drilling operations were not immediately commenced. At this time Clement and his associates entered into a drilling contract to drill a well on the lease, and while this well was waiting to be completed the trust declaration dated December 12, 1932, was entered into (R-27). The trust instrument provided that the trust should be known as the Nebo Oil Company. Clement testified (R-27):

"We anticipated the well would produce. In filing that trust instrument, the parties had in mind simply to make a record showing of their ownership. We had previously held in our own name the same title in trust for the parties."

The trust instrument vested broad and discretionary powers in the trustee to hold, manage, operate, and deal with the trust property. It limited the liability of the parties and provided for a transfer of an entire interest. No certificates were issued; the trust had no officers, no minute book or seal; it held no regular meetings; it maintained no separate offices; it was not listed in any telephone directory; it had no separate employees other than those on the leasehold, and all of its business was administered in the office of Replogle, Johnston and Clement (R-28). These partners subsequently extended advances and guarantees to the trust amounting to the aggregate of $90,000.00. See exhibits R-65, 67, 69, and statement of the court R-75. On November 10, 1933, there was executed a limitation on the powers of the trustee providing that no expenditures should be made except on the trust property and providing for disbursement, when received, of all surplus funds. On February 14, 1935, the trust was further amended providing it should terminate three years from that date, but that it might be extended by agreement; that the trustee should make quarterly disbursements and should have no power to drill additional wells. On October 7, 1933, prior to the last mentioned amendments, an oil and gas lease known as the "Odebracht Lease" previously acquired by the three individuals, title to which was held by Clement, was declared by Clement to be a trust property. The first well was

completed December 15, 1932, and in the following 18 months three additional wells were drilled. Other than the two leases above named, the trust owned no other properties, and all the funds received by it were either applied to the cost of further development or were disbursed to the partner beneficiaries. There have been no transfers of interest nor any attempt to sell beneficial interests in the trust. The Board of Tax Appeals, from the foregoing facts, held the Petitioner a trust. The Circuit Court held that the foregoing facts justified the Commissioner in determining that Petitioner was an association taxable as a corporation and reversed the Board of Tax Appeals.

Specification of Errors

Petitioner says that the Circuit Court erred in the following particulars in its decision in this case:

1. In considering the factual determination of whether Petitioner more nearly resembled a trust or more nearly resembled an association, as this had been determined by the Board of Tax Appeals.

2. In holding that Petitioner was an association taxable as a corporation, when in fact Petitioner more nearly resembles a partnership, if not a trust.

Summary of Argument

The Petitioner relies on the following propositions in support of its Petition:

1. The Circuit Court is without power to review questions of fact determined by the Board of Tax Appeals.

2. That the facts do not support the Circuit Court in its finding that the Petitioner was an association.

Argument

I.

The Circuit Court is without power to review questions of fact determined by the Board of Tax Appeals.

Section 801, Revenue Act of 1934, and Section 1001, Revenue Act of 1936, define the terms "corporation" and "partnership" as follows:

> "(2) The term 'corporation' includes associations, joint-stock companies, and insurance companies.
>
> "(3) The term 'partnership' includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this Act, a trust or estate or a corporation; and the term 'partner' includes a member in such a syndicate, group, pool, joint venture, or organization."

Sections 161, Revenue Acts of 1934 and 1936, provide that the trust income distributable to beneficiaries shall be taxable to the beneficiaries and not to the trust or fiduciary.

Sections 181, Revenue Acts of 1934 and 1936, provide that the income of a partnership is taxable to the individuals.

A tax upon corporation income is provided by Sections 13 of the Revenue Acts of 1934 and 1936.

The Revenue Act does not make any provision for the taxation of an entity, which has the characteristics of both an association and a trust. The determination of the proper classification of such an entity which has some of the characteristics of both, but not all of the characteristics of either, is made by determining which it more closely re-

sembles. That is by determining whether it more closely resembles a trust, for taxation purposes, as defined by the regulations and the decisions of the court, or an association, for taxation purposes, as defined by the regulations and the decisions of the court. Whether this hybrid is more nearly fish or more nearly fowl has been held to be a determination of fact and each case must rest upon its own facts.

The most recent decisions of this Court determining on the facts presented in each case, the taxable status as trusts or associations, of certain taxable entities there involved, are as follows:

Swanson v. *Commissioner of Internal Revenue*, 296 U. S. 362, 56 S. Ct. 283;

Helvering v. *Coleman-Gilbert Associates*, 296 U. S. 369, 56 S. Ct. 285;

Helvering v. *Combs*, 296 U. S. 365, 56 S. Ct. 287;

Morrissey v. *Commissioner of Internal Revenue*, 296 U. S. 344, 56 S. Ct. 289;

A. A. Lewis & Co. v. *Commissioner of Internal Revenue*, 301 U. S 385, 57 S. Ct. 799.

In *Commissioner* v. *Horseshoe Lease Syndicate*, 110 Fed. (2d) 748, certiorari denied 311 U. S. 666, 61 S. Ct. 24, the court said:

> "Upon petition to review a decision of the Board of Tax Appeals, we must decide whether or not the respondent was, during the tax year 1932, an association within the meaning of Section 1111 (a) (2) of the Revenue Act of 1932, 26 U.S.C.A. Int. Rev. Acts, and, as such, was subject to income tax as a corporation.
>
> "It has been said that no inelastic rule can be advanced to settle the question, due to the variety of circumstances under which it may arise, but that the facts of each case, must control its determination. Morris-

sey v. Commissioner, 296 U. S. 344, 56 S. Ct. 289, 80 L. Ed. 263. * * *

* * * * * * * * * * *

"The determination of this issue depends upon whether the syndicate, so organized and operated, resembles a corporation more nearly than it does a partnership, not being either exactly. Commissioner v. Brouillard, 10 Cir., 70 F. (2d) 154; Bert v. Helvering, 67 App. D.C. 340, 92 F. (2d) 491. This is a question of fact, and the Board of Tax Appeals, under the stipulated facts, found that, for purposes of the income tax laws, the syndicate more nearly resembled a partnership. This finding must be upheld by this court if there is substantial evidence to support it, even though conflicting inferences fairly might be drawn by reasonable men from the undisputed facts. South Chicago Coal & Dock Co. v. Bassett, 60 S. Ct. 544, 84 L. Ed. —, Feb. 26, 1940.

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"*From the undisputed facts above stated, a reasonable inference of fact may fairly be drawn that respondent was not an association within the meaning of the statute. Therefore, there is substantial evidence to support the finding of the board to this effect, and its conclusion of law that respondent was not subject to income tax as a corporation was correct.* Cf. Lucas, Commissioner v. Extension Oil Co., 5 Cir., 47 F. (2d) 65; Commissioner v. Brouillard, 10 Cir., 70 F. (2d) 154; Myers v. Commissioner, 7 Cir., 89 F. (2d) 86; Commissioner v. Gerstle, 9 Cir., 95 F. (2d) 587; Commissioner v. N. B. Whitcomb Coca Cola Syndicate, 5 Cir., 95 F. (2d) 596. See also Revenue Act of 1932, Section 1111 (a) (3), 47 Stat. 289, 26 U.S.C.A. Int. Rev. Acts." (Emphasis ours)

In *Del Mar Addition* v. *Commissioner*, 113 Fed. (2d) 410, the court said:

> "In cases involving the question of whether a business entity is, for taxation purposes, a corporation as defined by Section 801 (a) (2) of the Revenue Act of 1934, or a partnership under the definition of Section 801 (a) (3) thereof, and the entity does not conform to either definition entirely, the test applied is which of the two it more closely resembles. This is a question of fact, and the Board's finding thereon, if supported by evidence, must be upheld."

In this case the Board held (R-13):

> "Petitioner held, under the facts, to be a trust for purposes of income taxation and not an association taxable as a corporation."

As this finding is no doubt supported by some evidence and is not wholly unreasonable, the Circuit Court was without power to reverse this finding. The power of review of the Circuit Court upon appeals from the Board of Tax Appeals is fixed by Title 26, *U.S.C.A.*, Sec. 1141, Section 1 of Subsection (c) which reads:

> "(1) To affirm, modify, or reverse. Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for rehearing, as justice may require."

This section has been construed by this Court as limiting the review of a Circuit Court to matters of law and prohibiting a review by the Circuit Court of findings or conclusions of fact by the Board where supported by substantial evidence. See *Elmhurst Cemetery Co.* v. *Commissioner*, 300 U. S. 37, 40, 57 S. Ct. 324, 325:

> "* * * Accordingly it (the Circuit Court) reversed the Board and directed affirmance of the Commissioner's assessment.

"This action, we think, amounted to an unwarranted substitution of the Court's judgment concerning facts for that of the Board. There was substantial evidence, as appears above, to support the latter's conclusion, and in such circumstances this must be accepted. It is the function of the Board to weigh the evidence and declare the result. We undertook to state the applicable rule in Helvering v. Rankin, 295 U. S. 123, 131, 55 S. Ct. 732, 736, 79 L. Ed. 1343, and General Utilities & Operating Company v. Helvering, 296 U. S. 200, 206, 56 S. Ct. 185, 187, 80 L. Ed. 154."

In *Palmer* v. *Commissioner of Internal Revenue*, 302 U. S. 63, 58 S. Ct. 67, the Court said:

"* * * But we cannot say that the Board here, in finding the value of the shares of the newly organized United as of the time of adoption of the first plan, did not consider the market prices of the rights. The findings are inferences which the Board was free to draw from all the facts and circumstances disclosed by the record. Such a determination of fact is not to be set aside by a court even if upon examination of the evidence it might draw a different inference. Helvering v. Rankin, 295 U. S. 123, 131, 132, 55 S. Ct. 732, 736, 79 L. Ed. 1343; Elmhurst Cemetery Co. v. Commissioner, 300 U. S. 37, 57 S. Ct. 324, 81 L. Ed. 491. * * *"

In *Helvering* v. *National Grocery Company*, 304 U. S. 282, 58 S. Ct. 932, the Court said:

"Fourth. The Court of Appeals, instead of limiting its review to ascertaining whether there was evidence to support the Board's findings and decision, made on all the evidence, as upon a trial de novo, in effect, an independent determination of the matters which had been in issue before the Board. The court was without power to do so. Helvering v. Rankin, 295 U. S. 123, 131, 132, 55 S. Ct. 732, 736, 79 L. Ed. 1343. *To draw inferences, to weigh the evidence and to de-*

clare the result was the function of the Board. Hulburd v. Commissioner, 296 U. S. 300, 306, 56 S. Ct. 197, 200, 80 L. Ed. 242; Elmhurst Cemetery Co. v. Commissioner, 300 U. S. 37, 40, 57 S. Ct. 324, 325, 81 L. Ed. 491." (Emphasis ours)

In *Helvering* v. *Kehoe,* 309 U. S. 277, 60 S. Ct. 549, the Court said:

> "Under the rule often announced, the function of the Board of Tax Appeals is to weigh the evidence and declare the result as to matters properly before it. Upon review the court may not substitute its judgment of the facts for that of the Board. When there is substantial evidence to support the conclusion of the latter this must be accepted. Helvering v. Rankin, 295 U. S. 123, 131, 55 S. Ct. 732, 736, 79 L. Ed. 1343; General Utilities & Operating Co. v. Helvering, 296 U. S. 200, 206, 56 S. Ct. 185, 187, 80 L. Ed. 154; Elmhurst Cemetery Co. v. Commissioner, 300 U. S. 37, 40, 57 S. Ct. 324, 325, 81 L. Ed. 491."

See also *Colorado National Bank* v. *Commissioner,* 305 U. S. 23, 59 S. Ct. 48, and *Helvering* v. *F. & R. Lazarus & Co.,* 308 U. S. 252, 60 S. Ct. 209.

The Board, having the witnesses before it and having heard *all* the evidence with its proper emphasis and not any synopsis or transcript thereof, held, on this evidence which, at most, permits conflicts of conclusions, that the taxpayer was a trust. This finding should have been sustained. The Tenth Circuit Court did not hold that the Board was not supported in its conclusion. It merely held:

> "Hence, we conclude the resemblance to a corporate organization was sufficient to *warrant* the Commissioner in treating the trust as an association."

The Circuit Court did not undertake to say that the evidence did not justify the Board's conclusion. We do not think it could have so said. But we feel that no decision of the Circuit Court can be supported which reverses the Board's decision unless it can and does say that the findings of the Board are not supported by the evidence.

II.

That the facts do not support the Circuit Court in its finding that the Petitioner was an association.

Not all trusts which handle money or hold property are to be held associations. See *A. A. Lewis & Co.* v. *Commissioner*, 301 U. S. 385, 57 S. Ct. 799.

In this case there is very little resemblance to either a corporate form or to a method of doing business which has been held to classify the parties as an association taxable as a corporation. If the label is to be torn from this entity on the theory that it is not in fact a trust, nevertheless it is not to be classified as an association if it more nearly resembles a partnership. We are firmly convinced that the resemblance to a partnership is much greater than the resemblance to an association.

Here partners in business acquired an oil and gas lease. No one else was taken in and the partners advanced their private capital for the development of that lease. As a matter of fact, they did not avail themselves of any immunity from liability, nor other benefits derived from an association. They were compelled to and did continue to administer all the affairs of the trust from their partnership office, the partners handling all such administrative matters.

In *Commissioner of Internal Revenue* v. *Gibbs-Preyer Trusts Nos. 1 & 2*, 117 Fed. (2d) 619, the court said:

> "Under the Revenue Acts of 1934 and 1935, a tax is imposed upon every corporation and the term 'corporation' is defined by statute to include associations (c. 277, 48 Stat. 680, 26 U.S.C.A., Int. Rev. Acts, page 790, c. 829, 49 Stat. 1014, 26 U.S.C.A., Int. Rev. Acts, page 811).
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> "The term 'association' as used in these Acts embraces associations as they existed at common law and does not require organization under a statute or with statutory privileges. Whether a trust is an association taxable as a corporation must in the last analysis be determined by the facts peculiar to the case under consideration and in determining a taxable status, the court will take into consideration the purposes set out in the instrument creating the trust and the activities of the trustee and also of the cestuis que trustent.
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> "It is not always controlling that one or more persons associate themselves together for the purpose of engaging in business for profit. If Congress had desired or intended to tax every association as a corporation it could have done so easily in simple and unmistakable language and if it had intended such an application of the statutes here in question, it would have so provided. It is persuasive that Congress intended to tax as a corporation only associations conducting their business for profit after the method and form of a corporation, with its economic advantages. The Congress has, in repeated enactments, extended over many years, provided for the taxation of trusts, partnerships and associations as separate taxable entities. It is clear it was the legislative intent to exclude one from the other and where the entity or enterprise in question which it is sought to tax as an association under the corporation statute, resembles a corporation in some respects and a pure trust in others, the fea-

tures of similarity should be compared and the marks of dissimilarity contrasted and the two balanced, and from this the true taxable entity determined.

* * * * * * * * * * *

"Not all of these features are present in the trusts involved. While title to the assets was in the trustee, and while the continuity of the enterprise might be affected through the transfer of a beneficial interest by reason of death, these are but the characteristics of a pure trust. There was, however, no limitation of liability of the cestuis que trustent and the trustee did not exercise a centralized management of the properties.

"We are of the opinion that the trusts were not associations, taxable as corporations on the ground that they were doing business as such. Lewis & Company v. Commissioner, 301 U. S. 385, 57 S. Ct. 799, 81 L. Ed. 1174."

See also *Commissioner* v. *Brouillard*, 70 Fed. (2d) 154, certiorari denied 293 U. S. 574, 55 S. Ct. 85; *Tyson* v. *Commissioner*, 54 Fed. (2d) 29; *Lucas, Commissioner* vs. *Extension Oil Co.*, 47 F. (2d) 65; *Commissioner of Internal Revenue* vs. *Duckwitz*, 68 F. (2d) 629; *Myers* vs. *Commissioner of Internal Revenue*, 89 F. (2d) 86; *Helvering* vs. *Washburn*, 99 F. (2d) 478.

In *Commissioner* v. *Rector & Davidson*, 111 Fed. (2d) 332, certiorari denied 311 U. S. 672, 61 S. Ct. 33, the Court said:

"The Revenue Act of 1932, Section 1111 (a) (2), defines a corporation to include associations, joint stock companies, and insurance companies, and paragraph (a) (3) of the section, 26 U.S.C.A. Int. Rev. Code, Sec. 3797 (a) (2), defines a partnership to include a syndicate, group, pool, joint venture, or other unincorporated organization through or by means of which any

business, financial operation, or venture is carried on, and which is not a trust or estate or corporation. The Supreme Court recognized five salient features of a corporation in the case of Morrissey v. Commissioner, 296 U. S. 344, 56 S. Ct. 289, 80 L. Ed. 263. They are (1) title to the property held by the entity, (2) centralized management, (3) continuity uninterrupted by deaths among the beneficial owners, (4) transfer of interest without affecting the continuity of the enterprise, and (5) limitation of the personal liability of participants.

"In the case before us the title was held in undivided interests by all of the participants, and they were tenants in common of realty. Centralized management was obtained, not by shareholders' votes, but by the creation of an agency relation by each co-owner as principal, and without provision for continuity. There was no limitation of personal liability. No stock was issued, no meetings were held, and the enterprise had no office, no seal, no minutes, and no stock books; nor was any trust ever created. In these circumstances, the finding of the Board of Tax Appeals that respondent was a syndicate or joint venture which resembled a partnership more nearly than it did a corporation was a fair and reasonable conclusion, supported by the evidence, and its decision should be affirmed."

See also *Commissioner* v. *Horseshoe Lease Syndicate, supra*, 110 Fed. (2d) 748, certiorari denied 311 U. S. 666, 61 S. Ct. 24.

It is our opinion that the entity here involved had substantially all of the characteristics of a partnership, whereas it had very few of the characteristics of a corporation or an association. In Petitioner's Petition before the Board of Tax Appeals, it alleged (R-8):

"Predicated upon these facts, petitioner contends that the commissioner is in error in taxing the income of this trust as the income of an association taxable as a corporation; that the income is properly reportable, as reported by the petitioner, as the income of a trust estate; that if the petitioner is in error in this regard that the facts above enumerated indicate that the status of the parties is more nearly that of a partnership than of an association taxable as a corporation and the tax imposed by the commissioner is nevertheless error."

This contention has been preserved through the entire proceedings. It is now Petitioner's position that if the Circuit Court chooses to say that as a matter of law Petitioner cannot be a trust, unless the Circuit Court could and would say that Petitioner is, as a matter of law, necessarily classed as an association, that rather than reversing the Board of Tax Appeals, the Circuit Court should remand the cause to the Board of Tax Appeals for a determination by that Board of the fundamental issue of fact of whether or not Petitioner is an association taxable as a corporation or a partnership.

The Board found that Petitioner was a trust, as it was in form a trust and as it was primarily engaged in the liquidation of an estate previously owned by the parties, rather than an association organized for the purpose of entering into or engaging in business, and that Petitioner enjoyed very few of the advantages or characteristics of a corporation. If the Circuit Court says the Board of Tax Appeals, as a matter of law, erred in this conclusion, nevertheless the Circuit Court is not authorized to say, upon these facts, that Petitioner was an association taxable as a corporation. This, for the reason that the facts would sup-

port a conclusion that Petitioner was a partnership. As the Board of Tax Appeals is the fact-finding tribunal, it must be remanded to the Board for this determination.

Conclusion

In conclusion, Petitioner reasserts that its Petition for Writ of Certiorari ought to be granted.

Respectfully submitted,

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